UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

RAYMOND BERNIER and FRANCIS BECK BERNIER, Plaintiffs, v. TOWN OF NORTON, MARK LUNEAU, Selectman; LEONARD LEMAY, Selectman; JOHN DANIELS, Selectman; MARCEL ISABELLE and SUZANNE ISABELLE and STATE OF VERMONT, Defendants	:	Docket No. 1:03-cv-318

RULING ON PLAINTIFFS' APPLICATION FOR PRELIMINARY INJUNCTION
(Paper 8)

Plaintiffs initiated this action in Vermont state court alleging, inter alia, the Vermont statutes allowing town selectmen to lay out roads for removal of lumber are unlawful. (See Paper 7.) The action was subsequently removed to this Court. Among the relief requested, Plaintiffs seek a preliminary injunction forbidding use of the right-of-way granted to Defendants Marcel and Suzanne Isabelle. (See Paper 7 at ¶¶ 42-44.) For the reasons discussed below, Plaintiffs' Application for Preliminary Injunction is DENIED.

BACKGROUND

Plaintiffs own more than 70 acres of real property located west of Vermont Route 114 in the Town of Norton,

Vermont ("the Town"). (Paper 7, ¶ 2.) Defendants Marcel and Suzanne Isabelle ("the Isabelles") own approximately 123 acres located adjacent to Plaintiffs' land. (Id. at ¶ 6.) The Isabelles' land, however, is land-locked with no legal access to public roads. (Id.)

In order to remove lumber from their land and transport it over Plaintiffs' land to Route 114, the Isabelles petitioned the Town for a right-of-way pursuant to VT. STAT. ANN. tit. 19, § 958 (2003). (Id. at ¶ 14.) A hearing was conducted on July 7, 2003 over Plaintiffs' objection. (Id. at ¶ 15.) On July 17, 2003, the Norton Board of Selectmen issued a Notice of Determination granting the Isabelles a right-of-way over a road on Plaintiffs' land, finding that this provided the most direct and straight access to Route 114 over an existing road. (Id. at Ex. G.) In addition, the Town required the Isabelles to post a $100,000 bond to cover any damages to Plaintiffs' land and to compensate Plaintiffs for any timber lost from widening the existing road. (Id.)

Plaintiffs brought this action challenging the legality of the Town's decision, alleging Defendants "acted in bad faith in the execution of their conspiracy" to deprive Plaintiffs of federal and state rights. (Id. at ¶ 22.) More specifically, they allege the unconstitutionality of the Vermont statutes authorizing creation of the right-of-way

(Count I); "trespass and threatened continuing trespass" (Count II); "conversion and appropriation" (Count III); and "civil rights violations" (Counts IV & V).[1] Along with requests for compensatory and punitive damages, Plaintiffs filed the application for a preliminary injunction presently before the Court.

DISCUSSION

In most cases, a party seeking a preliminary injunction must demonstrate (1) that it will be irreparably harmed in the absence of an injunction, and (2) either (a) a likelihood of success on the merits, or (b) sufficiently serious questions going to the merits of the case to make them fair ground for litigation, and a balance of hardships tipping decidedly in its favor. Forest City Daly Hous. Inc. v. Town of North Hempstead, 175 F.3d 144, 149 (2d Cir. 1999). One exception to the ordinary standard is that, where a preliminary injunction is sought against government action taken in the public interest pursuant to a statutory or regulatory scheme, the less demanding "fair ground for litigation" standard is

[1] Plaintiffs also include "Count VI, Declaratory Judgment" and "Count VII, Injunctive Relief"; however, these do not amount to separate causes of action, and consequently the Court will construe them as the relief requested rather than separate and independent claims. See Black's Law Dictionary 348 (6th ed. 1990), (defining "count" as a "separate and independent claim.").

inapplicable, and therefore a "likelihood of success" must be shown. Id. (citing Int'l Dairy Foods Ass'n v. Amestoy, 92 F.3d 67, 70 (2d Cir. 1996)). This higher standard reflects judicial deference toward "legislation or regulations developed through presumptively reasoned democratic process." Id. (quoting Able v. United States, 44 F.3d 128, 131 (2d Cir. 1995)). The Court need not consider the likelihood of success, however, because Plaintiffs have not demonstrated a likelihood of irreparable harm. See, e.g., Reuters Ltd. v. United Press Int'l, Inc., 903 F.2d 904, 907 (2d Cir. 1990) (holding that a party must first demonstrate irreparable harm before the court considers other injunction requirements).

Irreparable harm is "the single most important prerequisite for the issuance of a preliminary injunction." Rodriquez v. DeBuono, 175 F.3d 227, 233-34 (2d Cir. 1998). To constitute irreparable harm, an injury must be neither remote nor speculative, but actual and imminent, and it cannot be remedied by an award of monetary damages. Id. at 234. Here, Plaintiffs' argument concerning irreparable harm is sparse, at best, with no authority cited. Instead, Plaintiffs offer only a mere conclusory allegation of "immediate and irreparable injury . . . for which money damages will not suffice" without elaboration. (See Paper 7 at ¶ 43.) Such conclusory statements are insufficient to show irreparable

harm. See, e.g., Line Communications Corp. v. Reppert, 265 F. Supp. 2d 353, 357 (S.D.N.Y. 2003) (holding that mere conclusory statements are not sufficient to show irreparable harm).

The only harm Plaintiffs may suffer in the absence of an injunction is damage to property, specifically the existing road that the Isabelles seek to use as a right-of-way. Such harm, if it occurs, can be remedied by an award of monetary damages, and thus is not irreparable. See id. In fact, the Town recognized as much when it conditioned use of the right-of-way on the Isabelles posting a $100,000 bond to compensate for any damage that may result to Plaintiffs' property. (See Paper 7, Ex. G.)

CONCLUSION

Plaintiffs' Application for Preliminary Injunction is DENIED.

SO ORDERED.

Dated at Brattleboro, Vermont this ___ day of December, 2003.

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J. Garvan Murtha, U.S. District Judge